

May 7, 1996

Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

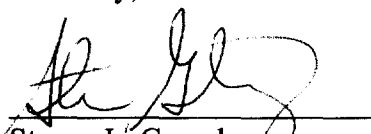
RECEIVED
MAY 8 1996
FCC MAIL ROOM

Re: RM No. 8775

Dear Sir/Madam:

Enclosed for filing are the original and four copies of the Formal Comment of Steven L. Greenberg. Copies have also been sent to Ms. Wanda Harris and to ITS. If you have any questions, please call me at 415-343-6575. Thank you.

Sincerely,


Steven L. Greenberg

cc: Ms. Wanda Harris
ITS

No. of Copies rec'd
List ABCDE

CCY
CCB

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

RECEIVED

MAY 8 1996

FCC MAIL ROOM

In the Matter of

Petition of America's

Carriers Telecommunications Association

To Regulate Internet

Telephony Providers

RM No. 8775

CC Docket No. 96-10

DOCKET FILE COPY ORIGINAL

FORMAL COMMENT OF STEVEN L. GREENBERG

Steven L. Greenberg ("Greenberg") hereby files this formal comment pursuant to the Commission's Order dated March 25, 1996, and in response to the Petition for Declaratory Ruling, for Special Relief, and for Institution of Rulemaking Proceedings (the "Petition") filed by America's Carriers Telecommunications Association ("ACTA").

Greenberg is a citizen who uses the Internet, is authoring a chapter on Internet telephony for a new book on Intranets, and is president of a firm that is applying Internet telephony and other real time data technology to enhance on-line commerce. As such, Greenberg has a direct and substantial interest in this proceeding.¹

In essence, Greenberg requests that the Commission find:

(1) The petition should be dismissed as moot; and

(2) The petition should be denied as against the public interest and against the intent of Congress.²

¹ Greenberg has a B.S. and M.B.A. from Cornell University, and is currently pursuing his J.D. at Stanford Law School, where he is also designing a course in telecommunications and the Internet.

² The Commission should also find that ACTA has no cause of action under 47 U.S.C. § 157, as no Respondent has proposed to provide a new service under the relevant statutes, as required in order for ACTA to obtain relief under § 157.

INTRODUCTION

ACTA's petition requests Commission action because “[a] growing number of companies are selling software for the specific purpose of allowing users of the Internet to make free or next to free local, interexchange (intraLATA, interLATA) and international telephone calls using the user's computer. . .”. ACTA alleges that these software providers "are telecommunications carriers and, as such, should be subject to FCC regulation like all telecommunications carriers". ACTA also submits that the FCC has the authority to regulate the Internet.

Greenberg does not dispute that the Commission has the authority to regulate the Internet in certain respects. See 47 U.S.C. § 153 ("communication by wire" includes "the transmission of writing, signs, signals, pictures and sounds of all kinds . . . [and] all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission"). But see Telecommunications Act of 1996, § 501, 47 U.S.C. § 230 (B) (the policy of Congress is “[t]o preserve the vibrant competitive free market that presently exists for the Internet . . . unfettered by federal or state regulation”). Nor does Greenberg dispute that the Commission has the authority to maintain the status quo by issuing the order requested by ACTA. United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

However, Greenberg does dispute that the Commission has jurisdiction to regulate “stand alone” software providers, and disputes that the Commission needs to institute an Internet rulemaking proceeding for the purposes alleged by ACTA.

ACTA'S PETITION IS MISLEADING

ACTA's Petition is misleading in that it attributes all actions related to Internet telephony to the “stand alone” software providers. Indeed, the action complained of by ACTA actually consists of five actions:

- (1) the provision of a software product (possibly distributed through a retailer);
- (2) that enables a computer;
- (3) with Internet access;
- (4) to be used as a long distance telephone, carrying voice transmissions;
- (5) at virtually no charge for the call³.

It is readily apparent that only the first of these actions, if any, is carried out by the Respondent software providers. The remaining actions are carried out by: (i) the computer manufacturer and system software providers (for action (2)); (ii) the local exchange carrier ("LEC") and Internet Service Provider ("ISP") (for action (3)); (iii) the user, a private business or citizen (for action (4)); and (iv) the LECs, interexchange carriers ("IXC"), ISPs, FCC, and state utility commissions, which set up the Internet access price structure (for action (5)). Yet despite the involvement of all of these entities, ACTA singles out the Internet phone software providers for investigation.⁴

SOFTWARE PROVIDERS ARE NOT SUBJECT TO COMMISSION JURISDICTION

The Commission has jurisdiction over all "communication by wire", including "the transmission of writing, signs, signals, pictures and sounds of all kinds . . . [and] all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission". 47 U.S.C. §§ 152, 153. Section 101 of the Telecommunications Act of 1996 defines a "Telecommunications

³ Contrary to the allegations of ACTA, there are charges for "the call". These include local call charges, Internet access charges, and computer and system software capital, operating and maintenance costs. Further, these costs are incurred by each party to the "call".

⁴ See, e.g., Donald L. Flexner, U.S. Department of Justice, "New Technology in Regulated Industries: Competition's Trojan Horse", Maritime Administration Bar Association, September 28, 1978 (regulated industries almost uniformly react to new technology by "throwing a protectionist regulatory net over the new competitive intruder . . . but the effort to do so is inherently self-defeating. The higher the rates go . . . the greater the rewards to the rate cutter and the efficient innovator").

Carrier” as any provider, to the public for a fee, of “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”

Software providers do not meet either of these definitions. They do not own or operate any telecommunications lines. They do not transmit any information. They do not possess or exercise monopoly power in any market, but often give their "product" away. They do not engage in any quasi-public business. They do not sell any goods or provide any on-going transmission services.

So what do these software providers do? They simply license the use of their intellectual property, i.e., lines of computer code. The licensee can then mix the licensed computer code with the licensee’s other computer code and run it on the licensee's processor.

Intellectual property, however, is not subject to the Commission’s jurisdiction. It is not transmission, nor is it an instrumentality, facility, apparatus or service (when packaged alone). Therefore, the Respondent software providers, as such, are not within the Commission's jurisdiction. If the Commission finds otherwise, it will impliedly assert jurisdiction over all computer hardware, software and on-line service providers, unnecessarily burdening those industries -- and the Commission itself, which lacks the resources to handle such an increase in scope.

As discussed below, ACTA makes no allegation, let alone a showing, that the regulation of Internet telephony software can or should be distinguished from the (non)regulation of other computer hardware, software and on-line services. Since, the licensing of computer code which can be used to reduce long distance charges does not confer regulatory jurisdiction on the Commission, the Petition should be dismissed.

**AT MOST, THE SOFTWARE IS CPE OR ESP, AND IS
NOT SUBJECT TO REGULATION AS A TELECOMMUNICATIONS SERVICE**

Even if the Commission finds that software is an instrumentality, facility, apparatus or service incidental to transmission, there can be no question that the software providers are not common carriers, but providers of a data processing related component of customer premises equipment ("CPE"). The Commission has already found that CPE is within its ancillary jurisdiction under 47 U.S.C. §§ 152-153, but, since it is subject to true competition, exempted it from regulation. See In re Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384, 419-20 (1980) (hereinafter "Computer II"), reconsideration, 84 F.C.C.2d 512 (1981), further reconsideration, 88 F.C.C.2d 512 (1981), aff'd sub nom. Computer and Communications Industry Association v. Federal Communications Commission, 693 F.2d 198, 204 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

In Computer II, the Commission decided to institute a new regulatory paradigm to distinguish between data processing service and traditional telecommunications service. As part of this decision, the Commission found that it had jurisdiction over both CPE⁵ and Enhanced Service Providers⁶ ("ESP"), but decided not to regulate them because they are subject to a competitive

⁵ See Telecommunications Act of 1996, § 3, 47 U.S.C. § 153(38) ("‘Customer Premises Equipment’ means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications”).

⁶ Basic telecommunications service is the offering of ". . . a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." Computer II at 419-20. By contrast, enhanced service ". . . combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." Id. at 387. See also Telecommunications Act of 1996, § 3, 47 U.S.C. § 153(41), ("‘Information Service’ means the

market. See Computer and Communications Industry Association v. Federal Communications Commission, 693 F.2d 198, 204 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). See also, Telecommunications Act of 1996, § 103 (an “Exempt Telecommunications Company” is “. . . any person determined by the [FCC] to be engaged . . . exclusively in the business of providing . . . (D) Products or services that are related to or incidental to the provision of [telecommunications or information services]).

As with traditional CPE, Internet telephony software is not owned by the carrier. It is owned the software provider, with a license owned by the customer. It is stored and used on customer owned computer equipment. It is paid for, if at all⁷, in a one-time payment, not on a metered basis. It is not directly compatible with conventional telephony equipment, but only with data processing equipment that uses the same protocol.

These characteristics make Internet telephony software a component of CPE used for the purpose of data processing and enhanced (or information) services. They also render its providers ESPs, not carriers.⁸ Given the Commission's prior findings that both CPE are ESP are within the

offering of a capability to for generating . . . [or] processing . . . information via telecommunications . . .”).

⁷ As alleged in the Petition, there are numerous Internet telephony software providers. Many of these providers make their software available at no cost or at nominal cost. Thus, there is no need for price regulation to protect the public, nor are the Commission's price and reporting regulations reasonably applicable to software providers. See 47 U.S.C. §§ 204, 214.

⁸ ACTA's Petition does not state why the Commission should treat software that enables the transmission of compressed audio data as a common carrier, while treating software that enables the transmission of all other data as an ESP. Since all data transmitted via the Internet to a user located outside of the sender's local calling area displaces a point-to-point intraLATA, interLATA or international call, there is no legal basis on which to differentiate between Internet telephony software and all other Internet based software.

purview of its jurisdiction, but that they need not be subject to regulation, the issues raised by ACTA's Petition (which makes no allegation that CPE and ESP are no longer truly competitive markets) are moot. See also, Telecommunications Act of 1996, § 401 (Commission should forebear from regulation if the underlying market is competitive).

**OTHER MECHANISMS ARE IN PLACE
TO ENSURE INFRASTRUCTURE INTEGRITY**

ACTA alleges that the diversion of voice traffic to the Internet may have a detrimental effect on the nation's telecommunications infrastructure because of the amount of data involved in Internet telephony. ACTA claims that this slowing of the Internet is contrary to the public interest, and requires regulation by the Commission.

While Greenberg agrees that a slowing of the Internet is contrary to the public interest, Greenberg does not agree that Internet telephony will have any long-term slowing effect. Greenberg also does not agree that the Commission needs to specifically regulate the Internet, since adequate regulatory mechanisms are already in place.

First, there will be no detrimental slowing effect on the telecommunications infrastructure from the increased proliferation of Internet telephony. On the contrary, the increased utilization of Internet telephony will prompt carriers to improve their infrastructure, as required by the public interest. In In re Telephone Company-Cable Television, 7 F.C.C. Rcd. 5781 (1992) (hereinafter "Video Dialtone"), for example, the Commission found that rather than burdening the existing infrastructure, its decision to grant telephone companies the right to offer video dialtone service would give them:

. . . the opportunity and incentive to create an advanced telecommunications infrastructure capable of transporting voice, data and video services. [Footnote omitted.] Such opportunities and incentives to improve infrastructure are clearly in the public interest.

7 F.C.C. Rcd. 5781 at 5795. But see Telecommunications Act of 1996, § 302(B)(3) (Commission's regulations and policies with respect to video dialtone shall cease to be effective). This finding applies equally today with respect to the Internet, and is demonstrated by the recent announcements by AT&T, MCI, MFS Communications and Teleport Communications Group that they are expanding their Internet related transport capabilities.

Second, specific Internet regulation is not needed because the price and quality of telecommunications service offered by existing common carriers are already monitored by the Commission in other dockets. Indeed, ACTA does not allege the existence of any new, i.e., substitute, transmission technology, such as wireless or satellite, but only a new application of existing transmission technology. The regulatory system heretofore established by the Commission and the Congress was wisely set up to provide sufficient oversight for new uses of existing technology, such as the use of wireline technology for Internet telephony. Indeed, it provides the Commission with the means to (1) regulate the call from the user to the ISP, as well as (2) all outgoing calls from the ISP. These powers give the Commission full control over the Internet backbone network without the need for technology specific regulation.⁹ Therefore, there is no need for an additional investigation as requested by ACTA.

⁹ If the change in usage patterns necessitates the elimination of flat calling rates or the establishment of a higher rate for a voice-and-data line as opposed to a voice-only line, the LECs or facilities-based IXCs can address those issues in existing forums. Similarly, if the subsidies embedded in the current rate system need to be altered to match the mix of local, long distance and private line service utilized in light of Internet telephony software, the Commission already has the mechanisms in place to examine and implement such changes. See, e.g., Telecommunications Act of 1996, § 101, 47 U.S.C. § 254(a) (Commission shall establish proceeding to consider modifications to universal service charges); In re Federal-State Joint Board on Universal Service, CC Docket No. 96-45. Finally, if the Commission decides that Internet access itself should be a universal service, it may seek comment in the appropriate forum.

**THE PUBLIC INTEREST REQUIRES THE
PROMOTION, NOT RESTRICTION, OF INTERNET TELEPHONY**

Section 501 of the Telecommunications Act of 1996 , which codifies 47 U.S.C. § 230 (B), explicitly states the policy of Congress to promote the “continued development of the Internet and other interactive computer services and other interactive media”. It also states Congress’ intent “[t]o preserve the vibrant competitive free market that currently exists for the Internet . . . unfettered by federal or state regulation.”¹⁰ The Commission should not ignore the intent of Congress as expressed in Section 501.

Internet telephony, like other Internet applications, has the ability to promote a more efficient society with better access to all forms of information, including text, audio and video. Such access has already been held to be in the public interest. Video Dialtone at 5795.

The ability to integrate real time audio and video with text, graphics and secure on-line transactions provides the foundation on which a substantial increase in Internet commerce can be based. Such on-line commerce, both between and within organizations, is in the public interest because it enhances America's competitiveness with other nations that cannot communicate information as quickly or engage in commerce with comparably low transaction costs.

Additionally, the result of the increase in on-line transactions and improvement in global competitiveness is likely to be an improvement in the infrastructure and an increase in overall


¹⁰ The privacy invasion that would be necessary to distinguish between compressed audio data and other types of data transmitted over the Internet would eviscerate the intent of Congress, and could implicate constitutional concerns. Greenberg believes that such an invasion would be contrary to the public interest and would set a foreboding precedent that would compromise the privacy of all telecommunications in this country. It would also open the door to requiring telecommunications carriers to regulate other forms of content, making them copyright protectors, on-line banking and stock trading regulators, on-line tax collectors, etc. Surely neither the Commission nor ACTA wants to be charged with such ominous responsibilities.

communication revenues, not a decrease. This is consistent with the Commission's finding in Video Dialtone, supra.

WHEREFORE, Greenberg requests that the Commission dismiss ACTA's Petition as moot and find that regulating the Internet is not in the public interest.

Respectfully submitted this 7th day of May, 1996.

By:



Steven L. Greenberg
Two Clark Drive, Suite 215
San Mateo, CA 94401